No. 14-1457

# In the
# Supreme Court of the United States

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BRANDON THOMAS BETTERMAN,

*Petitioner*,

v.

STATE OF MONTANA,

*Respondent*.

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

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## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

Nothing in the text, purpose, or history of the Speedy Trial Clause cuts off the right after the defendant has pleaded or been found guilty. The "right to a speedy and public trial" applies in all criminal "*prosecutions*," a term that embraces not just "the process of exhibiting formal charges against an offender," but "pursuing them to final judgment." WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828).

This Court has long characterized the Clause as a procedural safeguard aimed at swift resolution of prosecutions: it "guarantee[s] to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *United States v. Marion*, 404 U.S. 307, 313 (1971). That concern with bringing prosecutions to disposition accords with both the common-law meaning of "trial," which was often used generally to embrace the pronouncement of sentence, and the criminal system known to the Framers, in which sentencing followed directly from the verdict. Pet. Br. 22-29.

Montana and its amici insist that the Speedy Trial Clause is concerned solely with "protect[ing] the presumption of innocence." U.S. Br. 15; Resp. Br. 13, 29-30. That construction clashes with the text and structure of the Sixth Amendment, this Court's precedents, and the purposes served by the speedy trial right. From this Court's jurisprudence on the parallel right to a "public trial," to its decisions applying other Sixth Amendment protections to convicted defendants, to the right's broad historical antecedents guaranteeing "speedy justice," to the

right's core concerns, the sources of constitutional meaning all support applying the Clause to convicted defendants awaiting sentencing—and not just those who have not yet been convicted.

If adopted, the interpretation of the Speedy Trial Clause urged by Montana would deny criminal defendants "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967), at the stage of proceedings that is most critical in the overwhelming majority of prosecutions. Guilty pleas account for nearly all criminal convictions. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). That leaves sentencing as the sole proceeding where the defendant presents a case, contests issues, and presses for the adjudication of facts. Montana and the United States insist that sentencing "fulfills a very different purpose" from trial (Resp. Br. 42), and involves determinations less "fundamental" and procedures "less formalized" (U.S. Br. 21). But despite some differences in procedures and burdens, sentencing remains a "critical stage of the criminal proceeding," *Gardner v. Florida*, 430 U.S. 349, 358 (1977), and the resulting sentences are often at least as significant to a defendant as the decision to plead guilty.

To vindicate this core procedural right, and to ensure its ongoing relevance in modern criminal proceedings, this Court should reverse.

## I. The Speedy Trial Clause Applies in Criminal Prosecutions Through Sentencing and Judgment

### A. The Right to a "Speedy and Public Trial" Guarantees the Swift Resolution of Criminal Prosecutions

1. In *Barker v. Wingo*, this Court characterized the Speedy Trial Clause as a "procedural right[]" that promotes "a system where justice is supposed to be swift but deliberate." 407 U.S. 514, 521 (1972). Although this Court has primarily considered cases involving a delay in proceedings *before* a jury trial or guilty plea, it has described the Clause as guaranteeing that "justice should be administered with dispatch" and "orderly expedition." *Smith v. United States*, 360 U.S. 1, 10 (1959). And in the one case where the Court assumed the Clause's application at sentencing, it focused on the "delay in completing a prosecution." *Pollard v. United States*, 352 U.S. 354, 361 (1957).

Because a prosecution does not conclude until the defendant has been sentenced, the Speedy Trial Clause properly applies to sentencing delays. A "'prosecution' clearly imports a beginning and an end." *Bradley v. United States*, 410 U.S. 605, 609 (1973). A defendant's "sentencing is part of the prosecution," and constitutes "the judgment in a criminal case." *Id.* at 609, 611. Because the prosecution "terminates only when sentence is imposed," *id.* at 609, sentencing "clearly amounts to *the culmination of the trial*" for Sixth Amendment purposes, *United States v. Alcantara*, 396 F.3d 189, 196 (2d Cir. 2005) (emphasis added). The Speedy

Trial Clause thus naturally bars excessive delays in sentencing.[1]

2. This Court's cases interpreting the Sixth Amendment's twin rights to a "speedy and *public* trial" confirm that the Speedy Trial Clause applies to sentencing. The two rights are textually parallel. Because this Court has held that the right to a public trial requires that sentencing be public, *see In re Oliver*, 333 U.S. 257, 266-73 (1948), the speedy trial right also must apply to sentencing (Pet. Br. 16-17).

Montana acknowledges that the speedy and public trial rights are "textually linked," but attempts to cleave them apart by asserting that they "serve different purposes" (Resp. Br. 18). Certainly, the "core purpose" of Sixth Amendment rights must be considered alongside the constitutional text, *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984), but that cannot override the obvious textual relationship between a speedy trial and a public trial. That the rights may "attach" in different ways (Resp. Br. 18-19) cannot mean that the right to a "speedy and public trial" guarantees a public sentencing proceeding but not a speedy one.

Montana insists that *Oliver* "scarcely dealt with sentencing at all." Resp. Br. 19. But the Court

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[1] *Amici*'s concern that the Clause could apply "to resentencing proceedings and other more unusual situations" is overwrought. States Br. 15. A successful defense appeal will generally furnish good reason for a delay in resentencing, and a government appeal can be evaluated in light of "the important public interests in appellate review" and the government's grounds for appeal. *See United States v. Loud Hawk*, 474 U.S. 302, 315 (1986).

referenced secret sentencing no fewer than four times: the petitioner was "sentenced ... [under] circumstances of haste and secrecy," 333 U.S. at 259; the petitioner "had been sentenced to jail in the secrecy of the grand jury chamber," *id.* at 260; the petitioner, "[f]ollowing a charge, conviction, and sentence, ... was led away to prison—still without any break in the secrecy," *id.* at 272-73; an "accused cannot be thus sentenced to prison" in "secret proceedings," *id.* at 273.

The Court's repeated references to secret sentencing make clear that its public trial analysis and holding applied fully to the sentencing stage of the proceedings. The Court drew heavily upon the Sixth Amendment, even though the contempt proceeding was subject to Fourteenth Amendment due process. *See* 333 U.S. at 267-71; Pet. Br. 16-17. It would be passing strange if *Oliver* held secret sentencing to violate the basic right to a public trial in a contempt proceeding, only to permit such sentencing in a "criminal prosecution" covered by the Sixth Amendment. That is not a fair reading of the decision, which left no doubt that "the universal requirement of our federal and state governments that criminal trial be public" meant "an accused cannot be [secretly] sentenced to prison." 333 U.S. at 267, 273. The lower courts addressing the issue have also so concluded. *See United States v. Thompson*, 713 F.3d 388, 393-94 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012).

3. Montana also points to the Sixth Amendment's "impartial jury" right, but the relationship between the jury clause and the "speedy and public trial" clause is explained by the very "purposes" Montana emphasizes. Resp. Br. 17-19. The impartial jury

right applies to the stage of criminal prosecutions where a "jury" is convened. Pet. Br. 31. Indeed, this Court has explained that the right was aimed at barring the common-law practice of treating jurors "as interested parties who could give evidence." *Gannett Co. v. DePasquale*, 443 U.S. 368, 385 (1979). That purpose hardly requires that the right to a "speedy and public trial" be limited to petit jury trials. The "impartial jury right" has never been construed to limit the scope of other Sixth Amendment rights in that way.

### B. Neither the Speedy Trial Clause's Text nor This Court's Precedents Limit the Clause to Determination of Guilt

1. Seizing on the Sixth Amendment's reference to "the accused," Montana urges this Court to limit the Speedy Trial Clause to pre-conviction proceedings, when the defendant is "presumptively innocent." Resp. Br. 17. But in the context of a criminal prosecution, the term "accused" refers to the defendant through judgment, including "after conviction or plea of guilty." *Pollard*, 352 U.S. at 360. In the founding era, as now, being subject to an "accusation" meant having charges presented to a "competent judge, in order to inflict some *judgment* on the guilty person." 1 JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (emphasis added).

Precedent confirms this understanding. For example, the Sixth Amendment guarantees "the accused" the right to counsel, and this Court has long held that the right applies at sentencing. *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968). Indeed, just four years ago, the Court rejected the view that the Sixth Amendment is narrowly focused on the determination

of guilt or innocence. In *Lafler v. Cooper*, the "petitioner and the Solicitor General claim[ed] that the sole purpose of the Sixth Amendment is to protect the right to a fair trial" and "to ensure 'the reliability of [a] conviction following trial.'" 132 S. Ct. 1376, 1385, 1387 (2012). But this Court held that the Sixth Amendment "is not so narrow in its reach." *Id.* at 1385. "Even though sentencing does not concern the defendant's guilt or innocence," the Sixth Amendment—in that case, the right to effective counsel—still applies. *Id.* at 1386.

Just as in *Lafler*, Montana's effort to restrict the Sixth Amendment's speedy trial protection to an adjudication of guilt or innocence "fails to comprehend the full scope of the Sixth Amendment's protections." 132 S. Ct. at 1387-88.

2. This Court's Speedy Trial Clause decisions also belie Montana's narrow focus on the presumption of innocence. Because these decisions all involved delays before the determination of guilt, the Court naturally focused on the harm from delays "prior to trial." *E.g.*, *United States v. Ewell*, 383 U.S. 116, 120 (1966). But it does not follow that the Clause's guarantee of "orderly expedition" in how "justice should be administered," *Smith*, 360 U.S. at 10, and "an early and proper disposition" of criminal charges, *Marion*, 404 U.S. at 313, is limited to pre-verdict delays.

To the contrary, this Court's precedents show that the Clause serves purposes that apply after a determination of guilt. For example, *Barker* identifies several interests protected by the Clause that affect *only* the guilty. It explains that the right protects against "delay between arrest and punishment," which "may have a detrimental effect

on rehabilitation," and against "[l]engthy exposure" to deplorable conditions in local jails, which "has a destructive effect on character and makes the rehabilitation of the individual offender much more difficult." *Barker*, 407 U.S. at 520.

3. To tie the Speedy Trial Clause to the presumption of innocence, Montana must ignore the presumption's own constitutional foundation. The Court has treated the presumption of innocence, "although not articulated in the Constitution," as essential to due process and "secured by the Fourteenth Amendment"—not the Sixth Amendment. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976). While this Court has identified a separate enumerated right that protects the presumption, it is not the Speedy Trial Clause, but the Bail Clause of the Eighth Amendment: "Unless this right to bail before trial is preserved, the presumption of innocence ... would lose its meaning," *Stack v. Boyle*, 342 U.S. 1, 4 (1951). The Court has never explicitly tied the Speedy Trial Clause's purpose to the presumption in this way, and for good reason: the Clause's objective, ensuring the swift disposition of a criminal prosecution, protects defendants throughout the entire prosecution.

### C. The Framers Sought to Protect a Right to Speedy Justice that Extended Through Disposition of a Criminal Case

Both the historical antecedents of the Speedy Trial Clause and founding-era criminal law practices confirm that the Framers were concerned with moving criminal prosecutions to swift resolution. Pet. Br. 17-32. Even if criminal proceedings of the day revolved around petit jury trials, the speedy trial

right was understood to encompass the pronouncement of sentencing and judgment.

1. Montana does not dispute the clear and uniform practice of courts imposing sentences immediately or very shortly after verdict. And Montana acknowledges, as it must, that "the sentence attached to a given crime was statutorily-determined." Resp. Br. 25. Montana nonetheless insists that "[t]he court's imposition of judgment was separate from" sentencing because "judges exercised great discretion" by way of "pardons and grants of the benefit of the clergy." *Ibid.* That is flatly wrong. Pardons by the executive, and the availability of benefit of clergy, were binding on courts, whose power was limited to temporarily suspending the judgment. *Cf. Ex parte United States*, 242 U.S. 27, 44 (1916). That is why *Apprendi v. New Jersey* cited Blackstone's discussion of pardons to highlight "the invariable linkage of punishment with crime" and the absence of sentencing discretion. 530 U.S. 466, 478 (2000).

2. In *Klopfer*, this Court drew a direct link between the Speedy Trial Clause and Sir Edward Coke's articulation of the right to "speedy *justice*." 386 U.S. at 224 (emphasis added). By emphasizing that the "*end, which is justice*" shall not be delayed, Coke made clear that the delay in resolving the proceeding itself violated basic common law rights. *See* COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (E. and R. Brooke 1797). The point of commissioning justices with oyer (hear) and terminer (determine) powers was to have them *resolve* cases. *See* BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 19 (2d ed. 1979). They "had original jurisdiction to hear the matter from

*beginning to end*," and not just for "gaol delivery" (to try or release prisoners). *Ibid.*; Coke at 42.

Montana attempts to recast Coke's formulation of "speedy justice" as a right based on prolonged pretrial detention. *See* Resp. Br. 21. That reading ignores *Klopfer*'s discussion of Coke: "To Coke, prolonged detention without trial would have been contrary to the law and custom of England; but he also believed that the *delay in trial, by itself, would be an improper denial of justice*." *See* 386 U.S. at 224 (emphasis added). And in arguing that Coke understood the Magna Carta to be focused solely on pretrial detention (*see* Resp. Br. 20-21 (citing Coke at 315)), Montana ignores language in the same passage expressing the broader concern that "justice shall be duly administered." *See* Coke at 315.

Far from supporting a narrow focus on "a potentially innocent accused[]" (Resp. Br. 21), other historical sources cited by Montana affirmatively support applying the Speedy Trial Clause to sentencing delay. For instance, according to Chitty, when a "defendant has been found guilty in the court of King's bench ... it is incumbent on the prosecutor to enter a rule for *judgment* [within four days] ... in order to enable *the judges to pass sentence*." 1 CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 448-49 (Earle 1819) (emphasis added). "If the prosecutor neglect to give the rule," Chitty continued, "the defendant may, by motion to the court, compel him so to do; because otherwise he might *linger in prison to an indefinite period, with the conviction suspended over him*." *Id.* at 449 (emphasis added). Similarly, "[a]t the assizes, when the offence is capital, the defendant is *immediately* asked what he has to say why judgment of death should not be

pronounced against him." *Id.* at 448 (emphasis added). Historical practice prohibited post-verdict, as well as pre-verdict, delay.

Montana also reads Blackstone too narrowly. In tracing the Habeas Corpus Act of 1679 to the Magna Carta, Blackstone did not limit speedy-trial concerns to lengthy pre-conviction detention. *See* Resp. Br. 22. Blackstone stressed that the "courts of justice must at all times be open to the subject, and *the law be duly administered therein*" (1 BLACKSTONE, COMMENTARIES *137), and that a freeman shall not be deprived of his personal liberty "unless by the *sentence of the law*" (*id.* at *133). It was in the context of these broader principles that Blackstone cited Coke's formulation that any subject may "*have justice* ... freely without sale, fully without any denial, and *speedily without delay*." *Id.* at *137. It matters not that Blackstone and Coke did not contemplate the modern discretionary sentencing system; the "speedy justice" they described carried through to the proceeding's conclusion.

2. Colonial bills of rights carried forward this procedural "speedy justice" principle. Pet. Br. 19-20. Montana reads these provisions to distinguish "between the right of an accused to a speedy trial and the right of all persons to access the courts to obtain speedy justice." Resp. Br. 23. But that contention is at odds with *Klopfer*, which invoked the Massachusetts Constitution's right "to obtain right and justice freely ... promptly, and without delay" as a precursor to the Speedy Trial Clause. *See* 386 U.S. at 225 & n.21 (citing MASS. CONST. of 1780). This right, *Klopfer* explained, "has been construed as guaranteeing to all citizens the right to a speedy

trial." *Ibid.* The New Hampshire Constitution of 1784 included the same language. *Ibid.*

## II. The Specific Interests Protected by the Speedy Trial Clause Apply to Delays in Criminal Prosecutions After, As Well as Before, the Defendant's Conviction

Consideration of the three specific "interests of defendants which the speedy trial right was designed to protect," *Barker*, 407 U.S. at 532, confirms that the right applies through the imposition of sentence.

***Oppressive Incarceration:*** This Court has long recognized that conditions in county jails where defendants are held during prosecution are worse than prisons, and that prolonged detention caused by delayed proceedings can prejudice the defendant. *See Barker*, 407 U.S. at 520, 532. A significant harm of prolonged detention in county facilities is the inability to participate in "rehabilitative programs." *Ibid.*; *Smith v. Hooey*, 393 U.S. 374, 378 n.8 (1969). The Montana Supreme Court acknowledged that this concern with "effective rehabilitation" is "compelling." Pet. App. 13a, 21a.

Montana offers no rebuttal to the well-documented disparity between the availability of rehabilitation programs in jails and prisons. Pet. Br. 36-37. Nor does it dispute that Montana and many other jurisdictions require inmates to participate in such programs to earn reduced sentences. *Id.* at 35-36; *see also Smith*, 393 U.S. at 378 n.8.

Montana cites news articles noting that state prisons may be overcrowded. Resp. Br. 33. But none of those articles claims that conditions in prisons are anywhere near as bad as conditions in jails, or that rehabilitation programs are equally unavailable

across these facilities. And even if, as Montana insists (*id.* at 33), Montana prison inmates may be incarcerated in county jail facilities, a defendant awaiting sentencing is still subject to comparatively worse conditions there. As Montana's own contracts confirm, prison inmates in Department of Corrections custody have access to rehabilitation programs even when housed in county facilities.[2] There are no such requirements for pre-sentencing county inmates, who are typically held in different areas of these facilities.

Montana argues that the Court can ignore these concerns because a convicted inmate does not have a constitutional right to challenge the place of incarceration. Resp. Br. 31-32 (citing *Meachum v. Fano*, 427 U.S. 215 (1976)). That is a non sequitur. Defendants in custody who have not yet been convicted likewise have no constitutional right to challenge the place of confinement, but they nonetheless may invoke the Speedy Trial Clause to guard against oppressive incarceration. In focusing on a convicted defendant's diminished liberty interest (Resp. Br. 30-31), Montana conflates the Speedy Trial Clause's specific purpose—to ensure swift criminal proceedings—with a generalized liberty interest protected by due process. So long as the prosecution is ongoing, Montana must move with reasonable dispatch, and the harm caused by delay is addressed by the Sixth Amendment.

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[2] *See, e.g.*, Contract to Provide Operation and Management Services Minimum, Medium, and Close Custody Prison for Adult Male Offenders by and between Mont. Dep't of Corr. and Cascade Cnty. § 21 at 60, http://cor.mt.gov/Portals/104/Resources/Contracts/DetentionCenters/Cascade%20County%20%2804-053-DIR%29.pdf.

Not only can sentencing delay impair a defendant's efforts at rehabilitation, such delay also can increase the total amount of time the defendant spends in prison. For example, "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost." *Smith*, 393 U.S. at 378. That *Smith* involved a delay in bringing a defendant *to* trial is beside the point. Delay in sentencing can impair a defendant's chance at receiving concurrent sentences no less than pretrial delay.

***Impairment of defense***: Montana does not dispute that in some cases, "sentencing hearings are 'trial like' in that witnesses are sworn and testify, factual determinations are made, and counsel argue their positions." *Thompson*, 713 F.3d at 393. In those cases, a protracted delay carries the same risks for the defendants' sentencing case as it would for a trial defense, including lost witnesses and loss of memory. *Barker*, 407 U.S. at 532.

The United States' suggestion that this evidence simply relates to the "present characteristics of the defendant" (U.S. Br. 22) is bewildering. Judges routinely find facts of the crime at sentencing, ranging from the amount of loss in a fraud case (U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (2015) ("USSG") § 2B1.1), to whether a firearm was used (USSG § 2K2.1), to whether the defendant played a major role in the offense (USSG § 3B1.1). Undue delay impairs a defendant's ability to present evidence on these and many other factual issues judges must determine under sentencing guidelines at the federal and state levels.

***Anxiety and concern*:** Because the vast majority of criminal defendants now plead guilty, the purpose of "minimiz[ing] anxiety and concern of the accused," *Barker*, 407 U.S. at 532, would be profoundly undermined if the speedy trial right did not extend to sentencing. For most defendants, sentencing is "in effect, the 'bottom-line.'" Fed. R. Crim. P. 32, advisory committee's note to 1993 amendments (citation omitted). In some cases, a defendant who has pleaded guilty may not know whether he will be sentenced to any prison time; and in many others, the difference between the high and low ends of the statutory sentencing range is measured in decades. *See, e.g., Dillon v. United States*, 560 U.S. 817, 822 (2010) (discussing ranges of "10 years to life" and "5 to 40 years").

## III. The *Barker* Test, Not the Due Process Test Provides the Proper Framework for Analyzing Sentencing Delays

### A. The *Barker* Factors Account for the Difference Between Accused and Convicted Defendants

The *Barker* test "furnishes the flexibility to take account" of the differences between a delay before the determination of guilt and a delay in the imposition of sentence. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 314 (1986).

1. The lower courts that have applied the *Barker* analysis to sentencing delays routinely account for the "change in the [defendant's] status from 'accused and presumed innocent' to 'guilty and awaiting sentence.'" *See Burkett v. Fulcomer*, 951 F.2d 1431, 1442-43 (3d Cir. 1991); *see also Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986). They have made

equally clear, however, that the defendant's conviction does not vitiate his right to swift resolution of the prosecution. *Burkett*, 951 F.2d at 1443.

As with guilt-stage delays, a sentencing delay that crosses the threshold from "customary promptness" to one that is "'presumptively prejudicial'" triggers Sixth Amendment analysis. *Doggett*, 505 U.S. at 652 (quoting *Barker*, 407 U.S. at 530-31). Whether prejudice beyond the time of delay itself is required, and what degree of prejudice must be shown, depend on the strength of the other *Barker* factors. If a sentencing delay is not egregious or the result of "bad faith," *Doggett*, 505 U.S. at 657, there may be no Sixth Amendment violation absent evidence of some "particularized" prejudice, *id.* at 658 n.4. Having been convicted, a defendant in such a case should not be able to merely stand on the presumption of prejudice. But if, as in this case, the defendant articulates "particularized" prejudice from the delay, the *Barker* test is satisfied unless the government offers rebuttal evidence.

*Burkett* is instructive. There, as here, the defendant challenged an extended sentencing delay, during which he was detained in county jail. The defendant offered testimony that he was "unable to avail himself of institutional programs, critical to his rehabilitation, available through the state but not the county penal system." 951 F.2d at 1443. Applying the *Barker* analysis, the Third Circuit was "willing to credit Burkett's assertions" in the absence of contrary evidence. *Ibid.* And because the defendant offered "uncontested evidence" that he suffered "anxiety and distress" as a result of the delay, that harm "tip[ped] the scale slightly in Burkett's favor." *Id.* at 1443-44.

The *Barker* test thus already accounts for the difference between guilt- and sentencing-stage delays in a prosecution. It gives courts the flexibility to consider all the factors surrounding the delay. And it vindicates, in the sentencing context, the specific procedural right secured by the Speedy Trial Clause.

2. Montana has it backward in arguing that the Due Process Clause provides a better fit with claims of sentencing delay than does the Speedy Trial Clause. Resp. Br. 44-45. A due process claim depends on the identification of a constitutionally protected "liberty interest," and application of the Due Process Clause must be tailored to the nature of the "liberty interest" at stake. *E.g.*, *Meachum*, 427 U.S. at 226. But Montana elsewhere suggests that under *Meachum*, a convicted defendant does not have a "liberty interest" once he is convicted. Thus, while both Montana and the United States acknowledge the need for some remedy against undue delay in sentencing, their attempt to make the Due Process Clause fit the bill lacks proper grounding in this Court's jurisprudence. Delay in criminal prosecutions should be addressed by the constitutional provision that specifically addresses that delay: the Speedy Trial Clause.

The poor fit between sentencing delays and the *Lovasco* test for Due Process violations underscores the point. This Court developed that test, which requires a showing of "prejudice to the defense of a criminal case," in evaluating a *pre-indictment* delay, when no prosecution even was pending. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citation omitted). That test fails to account for the other harms that the speedy trial right exists to prevent: oppressive incarceration and anxiety and concern.

*Lovasco*'s prejudice requirement would be an absolute bar to relief in many cases, regardless of the length of the delay or the oppression and anxiety suffered by the defendant, "because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655 (quoting *Barker*, 407 U.S. at 532). Such a result would frustrate the purposes of the Speedy Trial Clause.

3. Nor do *Lovasco* and *Barker* merge when it comes to sentencing delay, as the United States suggests (U.S. Br. 33). First, although prejudice may be a more significant factor in sentencing delay cases, it is not a bright-line requirement. In rare cases where the delay is "extraordinary," *Doggett*, 505 U.S. at 652, or "deliberate," *Barker*, 407 U.S. at 530-31, prejudice may be presumed. Second, the degree of prejudice required under *Barker* turns on the circumstances, as opposed to the "substantial and demonstrable prejudice" standard suggested by Montana (Resp. Br. 51-52). Third, as *Burkett* illustrates, if the defendant identifies particularized prejudice, the government should bear the burden of at least rebutting that showing. *Cf. Doggett*, 505 U.S. at 658 n.4.

4. Montana wrongly suggests that "state and federal laws prohibit[ing] unreasonable sentencing delays" (Resp. Br. 49) render the Speedy Trial Clause inapplicable. The scope of core constitutional rights does not turn on the availability of other laws or remedies. If that were true, the Speedy Trial Clause would not protect against pre-conviction delays either. Numerous state and federal laws protect criminal defendants from excessive pre-conviction delays, *see, e.g.*, 5 LAFAVE ET AL., CRIMINAL PROCEDURE § 18.3(c) nn.78-79 (4th ed. 2015) (listing

state provisions regarding pre-conviction delays), but this Court has never suggested that these alternatives render the Speedy Trial Clause inapplicable to such delays.

### B. This Court May Impose Remedies Short of Dismissal

In "[c]ases involving Sixth Amendment deprivations," the "general rule" does not call for a single, rigid remedy; rather, it recognizes that "remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Consistent with that rule, the lower courts have already crafted a range of remedies proportionate to the harms flowing from excessive sentencing delays. There is no force to the concern that applying speedy trial protections at sentencing would necessarily entail "vacating the judgment" (Resp. Br. 48), or giving defendants "the windfall of dismissal" (U.S. Br. 24).

The Court's holding that "dismissal of the indictment" is "the only possible remedy" in cases involving *pre-conviction* delay, *Barker*, 407 U.S. at 522; *Strunk v. United States*, 412 U.S. 434, 438-40 (1973), does not mean the same remedy must apply to sentencing delay. Even assuming Speedy Trial violations are "unlikely" to be as harmful at the sentencing stage as the guilt stage (U.S. Br. 22-23), the logic of *Morrison* would require a *tailored* remedy—not the abandonment of all constitutional relief. Courts may simply "tak[e] into account the severity of the prejudice" in deciding "the question of appropriate remedy, if any." *United States v. Yelverton*, 197 F.3d 531, 538 (D.C. Cir. 1999).

State and federal courts have done just that. Some courts have reasoned that "in the context of unconstitutional delays before sentencing, '[t]he proper remedy ... is to vacate the sentence.'" *United States v. Washington*, __ F.3d __ , 2015 WL 5607653, at *3 (5th Cir. Sept. 24, 2015); *accord Jolly v. State*, 189 S.W.3d 40, 49 (Ark. 2004); *Trotter v. State*, 554 So.2d 313, 319 (Miss. 1989). Other courts have reasoned that "an appropriate remedy" for a sentencing delay that violates the Speedy Trial Clause is "to reduce [the defendant's] sentence" to reflect the extent of the delay. *See Burkett*, 951 F.2d at 1447; *United States v. Jones*, 744 F.3d 1362, 1370 (D.C. Cir. 2014). *Burkett*, for example, reasoned that because the defendant suffered delays while "in various county prisons, from conviction to sentencing, without access to rehabilitation and support systems," the proper remedy was to reduce the sentence by "the amount of [that] time." 951 F.2d at 1447. Because reducing the defendant's sentence or vacating its unserved portion would leave the conviction intact, these remedies account for the differences between guilt and sentencing proceedings pressed by the United States. U.S. Br. 21-22.

These remedies refute the notion that applying the Speedy Trial Clause to sentencing delays would "impose a societal cost completely disproportionate to the interests that would be served" (U.S. Br. 23). Courts can weigh the circumstances of the delay and fix an appropriate remedy. Nor would the application of such tailored remedies invite a "flood" of "speedy trial claims." *Cf.* Resp. Br. 45. Delays as egregious as Betterman's are outliers, *see, e.g.*, U.S. Br. 31 n.5 (noting 99-day median period between federal conviction and sentencing), and defendants can invoke appropriate statutory remedies for less serious

delays. Indeed, despite the lower courts' wide recognition of Sixth Amendment protections at sentencing, neither Montana nor its amici have pointed to any evidence or examples of litigation abuse.

## IV. The State Court's Inordinate Sentencing Delay Violated the Speedy Trial Clause

The *Barker* factors demonstrate that the fourteen-month sentencing delay here violated Betterman's speedy trial right. The key facts are undisputed. The Montana Supreme Court placed the length of the delay, the reasons for the delay, and the assertion of speedy-trial protections squarely in Betterman's favor. While Montana wishes to relitigate the delay's cause, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Betterman also made a specific showing on the fourth factor, prejudice, and Montana has failed to mount an adequate response even here, in its third round of briefing on the matter.

1. The Montana Supreme Court concluded that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a. That delay is facially unreasonable. *see Doggett*, 505 U.S. at 652 n.1, and Montana acknowledged in the trial court that the delay was long enough to trigger Sixth Amendment analysis, Pet. App. 32a.

2. Deeming the delay here "unacceptable," the Montana Supreme Court held there was "no legitimate reason" for the delay and "f[ou]nd no fault in Betterman for [the] delay." Pet. App. 20-21a. Montana seeks to relitigate those factual issues here,

arguing that Betterman caused delay by filing motions. Resp. Br. 55. But the Montana Supreme Court held that "both motions filed by the defense raised legitimate issues" (Pet. App. 20a), and such reasonable "petitioning of the courts" cannot excuse the delay, *Burkett*, 951 F.2d at 1441. The "[p]reparation of the PSI and the District Court's scheduling of a sentencing hearing took an inordinate amount of time, and these factors must be attributed to the State." Pet. App. 20a.

3. The Montana Supreme Court also stressed Betterman's "requests to be sentenced" in evaluating the delay. Pet. App. 21a. Betterman repeatedly sought a speedy sentencing and was rebuffed. *Id.* at 3a. These actions belie Montana's assertion that Betterman failed to take "affirmative steps to expedite his sentencing." Resp. Br. 55.

4. Betterman described with particularity the prejudice he suffered, and his articulation refutes the United States' claim that "speedy trial violations could be based on little more than a defendant's belief that being remanded to prison would be more advantageous." U.S. Br. 34. Betterman noted, among other things, that he could not access and "complete" rehabilitation programs ordered by the court, and that he was suffering "anxiety and depression caused by the uncertainty" of his fate. J.A. 87-88. These harms resonate strongly with *Barker*, which observed that "[m]ost jails offer little or no recreational or rehabilitative programs," 407 U.S. at 532, and stand unrebutted on this record.

Montana would dismiss Betterman's prejudice as "speculative" (Resp. Br. 57), but it offered no evidence below to refute Betterman's concrete contention that the delay denied him access to programs available to

inmates in state custody. Nor can Montana avoid this failure of proof by suggesting, for the first time, that Betterman's motion for reconsideration and affidavit were improper under Montana law. Resp. Br. 6. Montana never moved to strike the motion, and both the trial court and the Montana Supreme Court considered the motion on the merits. It is too late for Montana to stand on undeveloped state-law arguments. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

In any event, Montana's rejoinders are meritless. That the rehabilitation programs Betterman referenced are "conditions of the *probationary* portion of his sentence" (Resp. Br. 37) does not alter the harm Betterman suffered from being denied them for fourteen months. The trial court encouraged Betterman to access prison rehabilitation programs. Montana concedes that completion of such programs is relevant to the Montana Parole Board's early-release determinations. Resp. Br. 37; Mont. Admin. R. 20.25.505(2)(*l*). And, as noted (*supra* at 13 & n.2), Betterman would have had access to Department of Corrections rehabilitation programs after sentencing, even if he had "continued to reside at the local jail" (Resp. Br. 56).

5. This Court should reverse the judgment below and remand for determination of the appropriate remedy. The circumstances make it appropriate to modify Betterman's sentence, either by reducing it to offset the fourteen-month delay or to make it concurrent to his underlying offense. Even if the Court were to agree with Montana that the record does not "undisputably show" prejudice (Resp. Br. 56), the appropriate course would be to remand for an evidentiary hearing on that issue.

## CONCLUSION

The decision of the Montana Supreme Court should be reversed.

Respectfully submitted,

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